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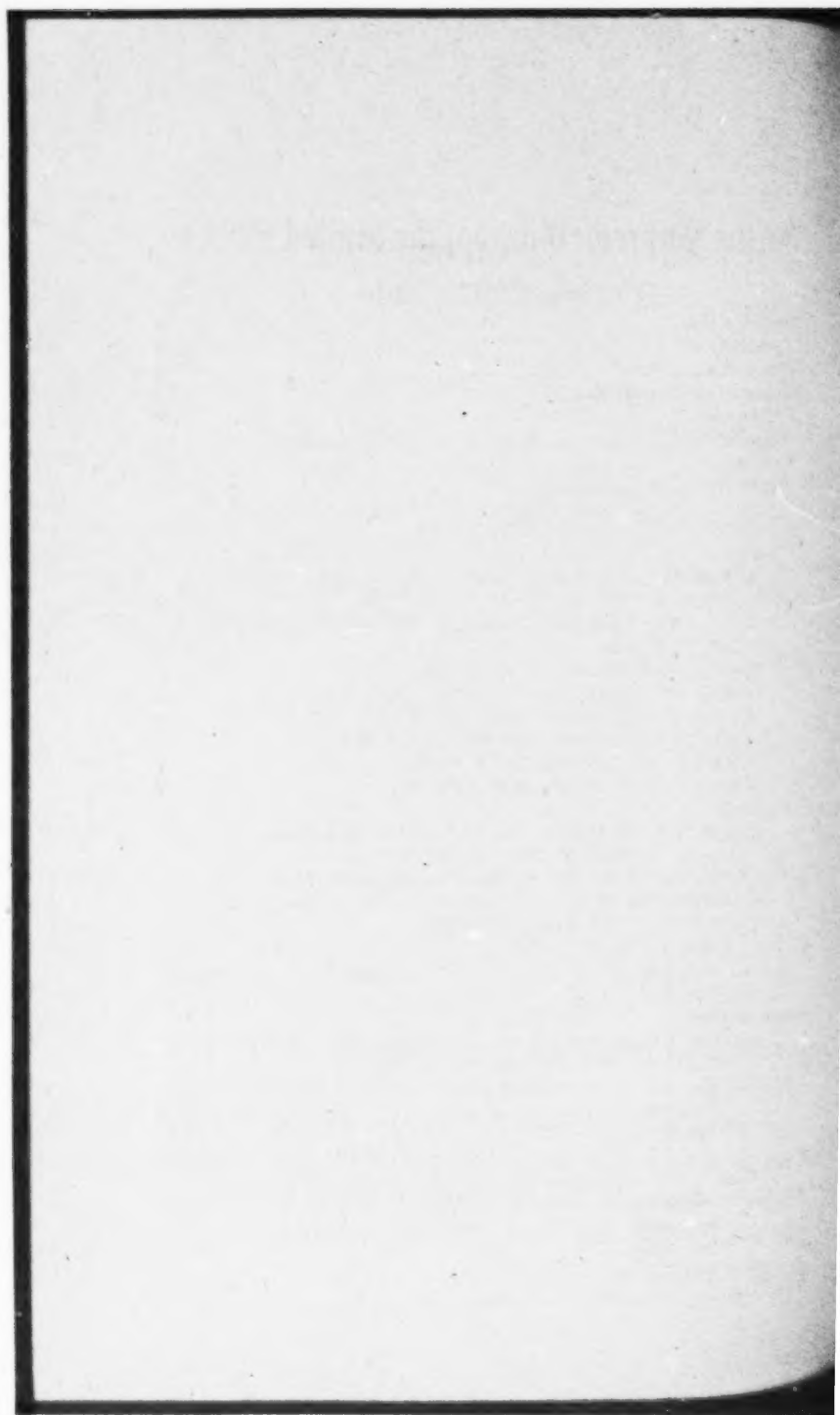
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1282

FRANCIS X. GOMILA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 390-396) is reported at 159 F. 2d 1006.

JURISDICTION

The judgment of the circuit court of appeals was entered February 17, 1947 (R. 389), and a petition for rehearing was denied March 24, 1947 (R. 415). The petition for a writ of certiorari was filed April 23, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the jury's verdict.

2. Whether petitioner's purchase of sugar not allotted to him, by means of coupons which he had no right to possess, can be justified on the ground that O. P. A. officials allegedly acted arbitrarily in withholding his allotment of sugar as an industrial user.

3. Whether the allocation provisions of the Second War Powers Act and the regulations governing the rationing of sugar issued pursuant thereto are constitutional.

4. Whether it was error to allow in evidence testimony concerning the scope of petitioner's activities as an industrial user of sugar and the action of O. P. A. officials with respect to them.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act and the rationing regulations issued pursuant thereto appear in the Appendix, *infra*, pp. 15-22.

STATEMENT

An indictment in four counts was returned against petitioner in the United States District Court for the Western District of Tennessee, charging violations of the Second War Powers Act and the rationing regulations governing sugar issued pursuant thereto (R. 1-4). The first count charged that petitioner knowingly acquired, pos-

sessed, and transferred 600 counterfeit consumer sugar ration coupons, knowing that they were counterfeit (R. 1-2); the second, that he acquired such coupons under circumstances which constituted a violation of the rationing regulations, even if the coupons had been genuine, in that petitioner, as an industrial user of sugar, could not acquire, possess, or transfer consumer ration coupons (R. 2-3); the third, that he acquired 3,000 pounds of rationed sugar in excess of his allotment as an industrial user (R. 3); and the fourth, that he received 3,000 pounds of sugar in exchange for ration coupons which he knew or had reason to believe were not validly issued (R. 4). Petitioner's demurrer to the indictment, in which he attacked the Second War Powers Act as an invalid delegation of legislative power, and the rationing regulations as vague and indefinite (R. 9-10), was overruled (R. 20-21). Petitioner was acquitted on the first count charging the knowing use of counterfeit stamps and was convicted on the other three counts (R. 13). He was sentenced to imprisonment for one year and to pay a fine of \$2,000 on each count, the prison sentences to run concurrently (R. 23-24). On appeal, the judgment was affirmed (R. 389).

The evidence for the Government may be summarized as follows:

Petitioner registered two establishments, the X-L Sales Company and the St. Bernard Syrup Co., with the Office of Price Administration, as

industrial users of sugar (R. 130, 132-135, 143-145). Under the regulations, *infra*, pp. 17-18, industrial users of sugar must register as such, and they then receive allotments of sugar quarterly, evidenced by certificates or ration checks (R. 164-168). Petitioner's allotments for both establishments were withheld for the second quarter of 1945, and he was informed that no allotment would be issued to him "until the Enforcement had cleared him" (R. 228, 245, 369).

On June 29, 1945, petitioner purchased 3,000 pounds of sugar from one Blen, a retail grocer in Memphis, paying the retail price of \$7.00 per hundred pounds (R. 41, 44, 48). He transferred to Blen 600 consumer ration coupons, each representing 5 pounds of sugar (R. 45). At the time of the transfer, the stamps were fixed to six sheets with scotch tape or cellophane (R. 46). Blen deposited the stamps in his ration bank account (R. 46), and in due course they were transferred to the verification center of the O. P. A., where they were found to be counterfeit (R. 90-91, 102-103). When Blen was notified by the O. P. A. that the stamps were counterfeit, he called petitioner, and petitioner told him to insist that the stamps were genuine and to say that Blen had obtained them from someone in Mississippi (R. 50).

Petitioner took the stand on his own behalf and testified that in June 1945, he had an option to purchase the Peerless Sugar Co., a wholesale

grocery in New York (R. 263, 347-348); that he purchased the sugar from Blen for the account of Peerless (R. 276, 294), using consumer ration coupons given to Peerless by its retailers which had fallen loose when the coupons were being prepared for deposit (R. 280, 294, 320-321). He said that he thought at the time that he would soon receive an allotment for his St. Bernard Syrup Co., and that from such allotment he would issue a ration check to cover the 3,000 pounds of sugar (R. 295, 321). He admitted that the Peerless Sugar Co. had about 200,000 pounds of sugar on hand in June 1945 (R. 322), that he was buying the sugar for use in the St. Bernard plant (R. 274-275, 321-322), and that the sugar was actually used in the manufacture of syrup a few weeks after the purchase (R. 353).

ARGUMENT

1. Petitioner challenges the sufficiency of the evidence to support his conviction (Pet. 23, 32-35) on the ground that the jury was not justified in rejecting his testimony that he purchased the sugar in good faith as a representative of the Peerless Grocery Co., and that he believed he had a right to consummate the transaction with Blen. According to petitioner's story, a wholesale grocery in New York with a substantial amount of sugar on hand was buying sugar at retail in Memphis, was using therefor 600 ration coupons given

by individual retailers, not one of which proved to be genuine, and was buying for storage (see Pet. 5-7) sugar which was actually used in the manufacture of syrup a few weeks later. Manifestly, the jury was warranted in finding petitioner's explanation unworthy of belief, and in reaching the conclusion that when O. P. A. withheld an allotment for his syrup company, he undertook by other means to get sugar to which he knew he was not entitled.

2. Petitioner's suggestion that his conduct, even if wrongful, was justified because the O. P. A. officials allegedly acted arbitrarily in withholding his allotment (Pet. 22-23, 29-32), is without foundation. If the action of the O. P. A. officials was wrong, petitioner had legal means of redress. He clearly was not entitled to take the law in his own hands and acquire consumer coupons which he had no right to have in order to obtain sugar which had not been legally allotted to him.

3. The contention that the Second War Powers Act constitutes an invalid delegation of legislative power (Pet. 21-22, 35-37) has consistently been rejected by the courts. *Ruggiero v. United States*, 156 F. 2d 976, 977 (C. C. A. 9); *United States v. Angelo*, 153 F. 2d 247, 249-250 (C. C. A. 3); *Rose v. United States*, 149 F. 2d 755, 760 (C. C. A. 9); *Randall v. United States*, 148 F. 2d 234, 235 (C. C. A. 5), certiorari denied, 325 U. S. 885;

O'Neal v. United States, 140 F. 2d 908, 912-913 (C. C. A. 6), certiorari denied, 322 U. S. 729; *United States v. Randall*, 140 F. 2d 70 (C. C. A. 2); *United States v. Grunenwald*, 66 F. Supp. 223, 226 (W. D. Pa.); *United States v. Wright*, 48 F. Supp. 687, 689-690 (D. Del.). As for petitioner's contention that the rationing regulations governing sugar are so complex and inconsistent that he could not know his obligations thereunder (Pet. 22, 24, 35-37), the short answer is that petitioner apparently understood the regulations very well until he undertook to take the law in his own hands in June 1945. Certainly, petitioner was well aware that industrial users obtained sugar by means of allotments, and that, as an industrial user, he was not entitled to acquire 600 consumer sugar stamps.

4. Petitioner's objections to the admission of evidence concerning the scope of his activities and the action of the O. P. A. officials with respect to them (Pet. 15-19, 37-43) are not well taken in view of the fact that these issues were injected into the case by petitioner himself. In his opening argument petitioner's counsel stated that "if there was any wrong done in disregard of the regulation involved in this case it was due to wilful, arbitrary, unlawful refusal of O. P. A. agencies to give him sugar that he was lawfully entitled to receive under the law and the regulations whose duty it was theirs to perform"

(R. 39). This theory colored the entire defense throughout the trial.

(a) In order to show the capacity in which petitioner was registered, the Government, through an O. P. A. representative, produced the registration of the X-L Sales Company as an industrial user (R. 134-135). The witness was allowed to testify from the O. P. A. records without objection that the company had received an allotment of 435,989 pounds of sugar for the first quarter of 1945 (R. 135), and she subsequently testified that it had received no allotment for the second quarter (R. 137). Later, the food rationing officer of the New Orleans district of O. P. A., in which both the X-L Company and the St. Bernard Company were registered, testified that all sugar allotment forms for industrial users had been transferred from the local boards to the district office (R. 203), and that all files were examined—"audited"—in that office (R. 212). When defense counsel objected to any further inquiry concerning the X-L Company, the United States Attorney stated that his purpose was to meet the charge of arbitrary refusal to grant sugar allotments for the second quarter of 1945 (R. 213-214). The rationing officer identified records showing the allotment of 435,989 pounds to the X-L Company on December 15, 1944 (R. 223), and also identified a record showing that on January 18, 1945, petitioner, on behalf of the X-L

Company, had filed a statement to the effect that as of December 31, 1944, he had no sugar on hand or points in the bank (R. 222-223). The rationing officer also testified that he was responsible for cutting off the allotment of sugar to petitioner for the second quarter of 1945 and that his action was approved by the regional office (R. 225). At this point defense counsel called for records of official action, and the rationing officer produced a teletype from the regional office stating that Washington had advised that no allotment be issued to the X-L Company pending decision by the Enforcement Branch (R. 228). This is one of the items of evidence objected to by petitioner (Pet. 17-18), but its admission was obviously proper under the circumstances.

(b) In the course of his testimony, the rationing officer had identified papers from the X-L file consisting of registrations by companies which had been merged to form the X-L Company (R. 209, 214-220). He identified one exhibit as an application by Mission Orange Bottling Works, formerly Lirette Bottling Works, and testified that from such record it appeared that Lirette had never registered with O. P. A. (R. 209). On cross-examination, he was questioned about that statement, and petitioner's counsel asked him whether there was anything illegal about the Mission Orange registration on its face (R. 239-240). He replied that the phrase "formerly Lirette

Bottling Works" should not have been in the application because Lirette had never registered (R. 240-242). He was asked whether allotments to Mission Orange had not been made on the basis of the application, and he replied that they had been until the district office commenced its audit of industrial files and the audit had disclosed registrations that should not have been made (R. 242), that when he found what he thought was an incorrect registration, he consulted the Enforcement Branch "in order that they might go into the whole thing" (R. 247). Petitioner objects to this latter testimony (Pet. 18), but it is evident that he elicited the response himself in an attempt to establish arbitrary action by O. P. A.

(c) Petitioner had brought out, on cross-examination of one O. P. A. witness, that the St. Bernard Company had transferred its plant from Memphis to Louisiana; that after its allotment for the second quarter of 1945 was refused, it applied for leave to transfer the plant back to Memphis; and that such application for re-transfer had not been acted upon (R. 151-154). When the food rationing officer of the New Orleans district was on the stand, he was also cross-examined about the application for re-transfer (R. 247-249). He was then asked this question by petitioner's counsel and made the following reply (R. 249):

Q. And as far as you know, the Enforcement division in its investigation took no official action and did not furnish any no-

tice or fix any hearing for Mr. Gomila to be heard on these matters?

A. Well, so far as I know the Enforcement division turned Mr. Gomila's case over to the United States District Attorney in New Orleans.

Petitioner is therefore hardly in a position to contend, as he does (Pet. 18), that the response to his counsel's question constitutes unfair action by the prosecution.

(d) When the chief of the sugar rationing division of the Memphis O. P. A. office was on the stand, he was also cross-examined about the St. Bernard Company's application for retransfer to Memphis, about statements by O. P. A. representatives in Memphis that they would request the file (R. 177-178), and about the fact that petitioner's attorney had not been notified when the file was received in Memphis (R. 191, 192). The witness was asked when the file came back to Memphis and replied that he would not know without looking up the records. He was then given the file, which petitioner's attorneys had examined over night, and was again asked when he received the file after writing for it on May 5, 1945. (R. 193-194.) The witness stated that he had found in the file a letter dated December 17, 1945, from the New Orleans office reading (R. 195):

We are returning the file which was loaned by your office to Miss Marian H.

Fant, one of our investigators in the Food Section Enforcement Division in New Orleans. We have completed our case against F. X. Gomila, and the matter will be referred to the District Attorney here within a few days. We appreciate your cooperation in the matter and will try to keep you advised of the outcome of this case.

He then testified that he received the file within a few days after December 17 (R. 195). After further questioning, he stated that he did not know when, before December 17, the file had been sent to the Memphis office and then loaned back to the New Orleans office (R. 197-198). At that point petitioner asked that the judge instruct the jury that the statement in the letter concerning the reference of charges against petitioner to the United States Attorney's office be disregarded, and the judge instructed the jury not to consider such statement for any purpose (R. 198-199). On redirect examination, the witness was asked whether he had information as to whether the St. Bernard Company had complied with the condition of the original transfer from Memphis to Louisiana, i. e., that it serve the same territory, and the witness answered that to the best of his knowledge it had not done so since the company's former customers had called the O. P. A. office and made inquiries (R. 201). Petitioner's counsel then interposed an objection to this testimony, and the judge instructed the jury to disregard it

(R. 202). Petitioner's contention that these two items of evidence which the judge instructed the jury to disregard had the effect of depriving him of a fair trial (Pet. 18-19) is clearly without merit.

(e) When petitioner took the stand in his own behalf, he testified that he did not know enough about the regulations to draw a distinction between an allotment so far as it affected his legal rights and the actual issuance of the ration evidences (R. 276-277). On cross-examination, he was questioned about his conduct of the various enterprises that made up the X-L Sales Company, his purpose in buying them, and the use he made of them (R. 287, 300-310). He was also questioned about the fact that, after having been allotted approximately 460,000 pounds on December 15, 1944, he had stated in another application that on December 31, 1944, he had no sugar on hand (R. 310-313). After the close of his testimony, petitioner made the motion to exclude all testimony regarding the X-L Company (R. 354-355) which is set forth in his petition (Pet. 15-16). The motion was properly denied, since the cross-examination in this respect was proper both to meet the charge of arbitrary action by O. P. A. and as bearing upon petitioner's credibility.¹

¹ Petitioner's contention that it was error to allow the O. P. A. witness who testified as an expert on the counterfeit nature of the coupons to state that she had testified a number of times in federal courts (Pet. 18), is obviously frivolous.

CONCLUSION

Petitioner's contentions are wholly devoid of merit. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

/ GEORGE T. WASHINGTON,
Acting Solicitor General.

/ THERON L. CAUDLE,
Assistant Attorney General.

/ ROBERT S. ERDAHL,
BEATRICE ROSENBERG,

Attorneys.

MAY 1947.

APPENDIX

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

SEC. 2 (a) (2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer

of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provides in pertinent part:

SEC. 2.5 Acquisition, use, transfer or possession of counterfeited or forged ration document.—(a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SEC. 2.6 Acquisition, use, transfer or possession of ration document.—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

* * * * *

SEC. 2.8 Wrongful acquisition, possession, use or transfer of rationed commodity.—No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order.

SEC. 2.9 *Transfer in exchange for invalid or improperly acquired ration document.*—No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it.

Second Revised Ration Order No. 3 (9 F. R. 13641) provides in pertinent part:

SEC. 3.3 *Industrial user allotments*—
(a) *General.*—To enable an industrial user to get and use sugar at his industrial user establishment, he is given an allotment for each use or product for which he has established a base-period use in accordance with General Ration Order 16. Allotments are given for fixed periods called allotment periods. The allotment periods are the following quarterly periods:

(1) First quarter: January to March, inclusive;

(2) Second quarter: April to June, inclusive;

(3) Third quarter: July to September, inclusive;

(4) Fourth quarter: October to December, inclusive.

(b) *Application for allotments.*—An industrial user's registration on OPA Form R-1200 is treated as an application for an allotment for his industrial user establishment for the quarterly period beginning January 1, 1944. Application for any other allotment period must be made, in person or by mail, to the Board with which his establishment is registered. No particular form need be used for such application.

The application, however, must be in writing and must be made not more than fifteen days before, nor more than five days after, the beginning of the period. However, the Board may permit an application to be made at any time before an allotment period under such circumstances as the Washington Office of the Office of Price Administration may direct. The Board, in its discretion, may also permit an application to be made at any time within the allotment period, but if it is made more than five days after the beginning of the period, the industrial user's allotment shall be reduced by an amount which bears the same proportion to the allotment as the number of days which have elapsed from the start of the period bears to the total number of days in the period.

(c) *Amount of allotment.*—The amount of an industrial user's allotment is determined on the basis of his use of sugar at his industrial user establishment during the quarter in the base period (1941) corresponding to the allotment period. (General Ration Order 16 describes the way in which base-period use for each quarter in the base period is determined.) The amount of sugar used by him during the quarter for which he has established a base-period use is multiplied by the percentage or percentages fixed in section 19.2 for that use or class of products and the numbers which result are added, and the total is his allotment, stated in pounds, for that use or class.

SEC. 3.18. *Use of allotments on and after January 1, 1944.*

* * * * *

(b) No industrial user may use more sugar in any allotment period for any pur-

pose or use for which allotments may be obtained than his allotment for that period plus any unused part of his allotments for earlier periods. Sugar used under an allotment before the beginning of the period for which it was granted shall, for the purposes of this paragraph be considered to have been used in the period for which it was granted.

(c) On and after January 5, 1944, an industrial user may not use sugar for any use or purpose unless he has registered his industrial user establishment on OPA Form R-1200.

SEC. 7.1 *Use of checks by depositors and non-depositors.*—Notwithstanding anything to the contrary contained in this order:

(a) No depositor, and, on and after February 8, 1943, no person required to be a depositor, shall, except in accordance with General Ration Order No. 3A, surrender or transfer stamps or certificates which are valid for deposit.

(b) Whenever this order requires or authorizes the surrender or transfer of stamps or certificates to a person, other than a bank for deposit, and such stamps or certificates are valid for deposit, a depositor shall not surrender or transfer such stamps or certificates but shall instead, under the same circumstances and with the same effect, issue to such person a check, valid for deposit, in weight value equal to such stamps or certificates.

(c) Whenever this order authorizes the delivery of sugar upon the surrender or transfer of stamps or certificates, such delivery may be made to a depositor upon receipt, by the person making the delivery, of a check valid for deposit issued to him

by the depositor and equal in weight value to such stamps or certificates.

(d) A person who neither is nor is required to be a depositor to whom a check is issued by a depositor or to whom a check is transferred by endorsement may transfer such check by endorsement to any person to whom and for any purpose for which stamps or certificates are authorized to be surrendered by this order.

(e) A depositor who has received stamps, certificates or checks from a registering unit or industrial or institutional user establishment may issue to it a check in weight value equal to the sugar which he has not delivered against such stamps, certificates or checks, but which he is then authorized to deliver to such registering unit or industrial or institutional user establishment against such stamps, certificates or checks.

(f) A depositor who has received stamps, certificates or checks as authorization for the delivery of sugar by him may not, except as provided in paragraph (e), issue a check against any part of the credit created by their deposit except to the extent that he has delivered sugar against them.

(g) Whenever this order refers to the delivery or acquisition of sugar (including the replenishment of inventory), upon or without the receipt or surrender of stamps or certificates, the issuance of checks by a depositor or, in the case of a person who neither is nor is required to be a depositor, the transfer of checks by endorsement shall be deemed to be included in such reference, unless the context shall otherwise require.

(h) No person may accept stamps, certificates, or checks which he knows or has

reason to believe are transferred or surrendered in violation of this section.

SEC. 7.2 *Nature and validity of certificates and stamps.*

(a) A certificate or stamp may be transferred only for the purpose of authorizing the consumer or registering unit to whom the certificate or stamp was issued to take delivery of the amount of sugar specified on the certificate or assigned to the stamp in Section 19.3, Schedule C,¹ of this order, and to permit the registering unit to which the certificate or stamp has been surrendered to take delivery of sugar in order to replenish its sugar inventory. Stamps in the hands of a consumer are valid only if attached to a War Ration Book.

(b) Each stamp authorizes delivery of sugar to a consumer only during the ration period assigned to such stamp in section 19.3.¹ A stamp received in accordance with this order by a registering unit, which is neither a depositor nor required to be one, authorizes the registering unit to take delivery of sugar in an amount equal to the weight value of the stamp if such a stamp is surrendered to another registering unit or a primary distributor within a month of the close of the ration period assigned to such stamp. A stamp surrendered to a depositor shall be valid for deposit in his account for a period of a month and ten days after the close of the ration period assigned to such stamp: *Provided, however,* That, notwithstanding anything to the contrary contained in this order, Stamp No. 12 may, on or before July 31, 1943, be sur-

¹ Amdt. No. 21 (6-15-45) substituted Sec. 20.3 for Sec. 19.3, Schedule C in above.

rendered by a registering unit which is not and is not required to be a depositor to authorize the registering unit to take delivery of sugar and may be deposited on or before August 10, 1943. Except as provided in paragraph (f) of Section 7.1, a depositor may issue checks at any time, against credits created by the deposit of a stamp. Stamps numbered one through eleven shall not be valid for deposit. If the ration period assigned to a stamp ends on a day which is not the last day of a calendar month and the next calendar month has a day which corresponds thereto, then a "month," as used in this paragraph, is the period from the last day of the ration period to and including the corresponding day of the next calendar month; otherwise it is the period from the last day of the ration period to and including the last day of the next calendar month.

* * * * *

(e) As used in this section the term "registering unit" includes industrial user establishments and establishments registered under General Ration Order 5 as Groups II, III, IV, V and VI institutional user establishments.